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No. 90-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LENORA B. FULANI, *et al.*,

Petitioners,

vs.

JOSEPH H. HOGSETT, in his official capacity as Secretary of the State of Indiana, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

Cases:

Anderson v. Celebrezze, 460 U.S. 780 (1983) 16

Board of Education v. Pico, 457 U.S. 853 (1982) 16

Moore v. Ogilvie, 394 U.S. 814 (1969) 14

Other:

42 U.S.C. § 1983 9

Constitution of The United States, Article III 2, 3

Constitution of the United States, First Amendment . . . 9, 10, 12

Constitution of the United States, Fourteenth Amendment . . . 9-12

Indiana Code § 3-6-4-1 8

Indiana Code § 3-10-4-5(c) . . . 7, 11

Respondents' Brief in Opposition to Petition for a Writ of Certiorari sets forth five argument points.

Only Points I and III respond directly to the petition. Since no new arguments are raised in the four paragraphs comprising these points, petitioners will not reply to them.

The new arguments raised in Points II and IV are not properly before this Court. These arguments call for reversal of rulings made in this case by the court of appeals and should be presented, if at all, by cross-petition for a writ of certiorari pursuant to Sup. Ct. R. 12.3.

The court of appeals ruled that the holding of the 1988 election did not render this action moot. See petition at 5a-6a. Without even referring to the court of appeals' decision, the respon-

dents, in Point II, repeat their failed argument that this action is moot. Even if this argument had been presented properly by a cross-petition, it would have to be summarily rejected on the merits because the court of appeals' ruling is based on clear and well-settled precedent.

In Point IV, respondents argue that the petitioners did not present an Article III case or controversy because their claims were based on a hypothetical state of facts. Like the mootness argument, this one also contradicts the decision of the court of appeals. The court of appeals considered and rejected the respondent's argument, which was adopted by the district court, that "because the [New Alliance] party was not denied access to the ballot in any way," (petition at 7a) it did not suffer

individualized injury within the meaning of Article III by reason of the fact that the respondents had granted the major parties an unprecedented waiver of the filing deadline and placed the major party candidates on the ballot as well. Instead, the court of appeals found that the petitioners did present an Article III case or controversy because they faced "increased competition" (Id.) that was real, not speculative. Petitioners amplify their comments on this issue below.

In Point V, respondents argue a grounds for dismissal of the complaint on the merits which was not addressed by the court of appeals. For the reasons set forth in their petition, the petitioners believe that this Court should reverse the court of appeals' dismissal based on laches and remand the case for

a ruling by the court of appeals on the merits of petitioners' constitutional and state law claims. This would necessarily include a ruling on the arguments set forth in Point V. However, even though these arguments are being presented prematurely by the respondents in this petition for certiorari proceeding, petitioners reply to them briefly below.

1. Petitioners' claims are in no way hypothetical.

The instant complaint clearly states claims, under the equal protection clause and the first amendment, for discrimination on the basis of political affiliation and belief. Officials of the State of Indiana granted to the major parties an unprecedented waiver of a ballot access filing deadline. The very rules that had been strictly enforced against minor parties in

Indiana and throughout the nation in the modern era[1] of restrictive ballot access statutes and judicial/administrative enforcement policies, suddenly were administratively nullified as soon as a uniform application of the express statutory terms would work a disadvantage to the major parties vis à vis a minor party in a presidential election. Such blatantly partisan conduct by election officials is plainly unconstitutional.

In a crude mischaracterization of the complaint, respondents and the district court argued that "[t]he basis for every claim" (opposition brief at 9)

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[1] Petition footnotes 2 and 3 set forth an overview of legal precedents that reflect the strict enforcement policies in the modern era of ballot access restrictions. It is most revealing that in their opposition brief the respondents cannot cite to a single modern precedent contrary to petitioners' position -- the three cases they cite date from 1899, 1935, and 1934 (opposition brief at 14-16).

asserted by petitioners was a hypothetical allegation in one non-essential paragraph[2] in a 64-paragraph complaint to the effect that petitioners had reason to believe that if they had missed the same filing deadline, they would have been denied access to the ballot. Obviously, this allegation was expressive of the unfairness of the discriminatory practices about which the petitioners complain, but did not allege any fact that was essential to any element of any of the petitioners' claims. For the Court's convenience, petitioners

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[2] The complaint alleges in ¶ 32:

> Upon information and belief, had the Fulani-Moore campaign failed to file the New Alliance Party candidates for presidential electors in a timely fashion or failed to comply with the requirements of the Indiana election code in any other respect, Fulani and Moore would not have been listed on the Indiana ballot.

have set forth excerpts from the instant complaint in the margin.[3]

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[3] The complaint alleges in relevant part:

Introduction

* * *

2. Indiana Code ("IC") 3-10-4-5(c) requires that candidates for presidential electors be certified to (i.e., filed with) the Secretary of State by noon August 1 before the general election. The Bush-Quayle candidates for presidential electors were not certified to the Secretary of State until August 4, 1988. The Dukakis-Bentsen candidates for presidential electors were not certified to the Secretary of State until August 8, 1988. It is settled law that election code filing deadlines are to be strictly enforced. Until now, such deadlines have been strictly enforced in Indiana.

3. Plaintiffs allege that the deadline provided in IC 3-10-4-5(c) must be strictly enforced; that the failure to meet this deadline is fatal to the Bush, Quayle, Dukakis and Bentsen candidacies in Indiana; and that if the Republican and Democratic candidates are permitted to remain on the ballot, Fulani and Moore's candidacies will be irreparably harmed and that rights secured to the plaintiffs by the First and Fourteenth Amendments to the United

(continued...)

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[3](...continued)
States Constitution will be violated.

* * *

13. Defendant State Election Board is charged by IC 3-6-4-1, et. seq., with the administration of elections in Indiana, including the composition of the Indiana ballots. The State Election Board and defendant Evan Bayh, the Secretary of State of Indiana who is also sued in his official capacity, share responsibility for carrying out the provisions of the Indiana Code pertaining to elections.

* * *

COUNT I

* * *

31. The Fulani-Moore campaign complied fully with all of the applicable provisions of the Indiana Election Code . . . and Fulani and Moore are therefore listed on the Indiana ballot.

* * *

33. The Bush-Quayle and Dukakis-Bentsen campaigns were fully informed by the Indiana election code of the requirements for obtaining a listing on the Indiana ballot. The Bush-Quayle and Dukakis-Bentsen campaigns did not comply with such requirements in that the Republican and Democratic candidates

(continued...)

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[3](...continued)
for presidential electors were not timely filed with the Secretary of State. Yet, Bush, Quayle, Dukakis and Bentsen are all listed on the Indiana ballot.

34. This disparate treatment by defendants of the Fulani-Moore campaign, on the one hand, and the Bush-Quayle and Dukakis-Bentsen campaigns on the other hand, violates plaintiffs' rights to political speech and equal protection of the law under the First and Fourteenth Amendments of the Constitution.

COUNT II

* * *

36. This claim is brought under 42 U.S.C. section 1983.

37. Fulani and Moore are minor party candidates for president and vice president of the United States, respectively.

38. Bush and Quayle are major party candidates for president and vice president, as are Dukakis and Bentsen.

39. The disparate treatment accorded by defendants to Fulani and Moore, on the one hand, and to Bush, Quayle, Dukakis and Bentsen on the other hand, discriminates against Fulani and Moore on the basis of their status as minor party candidates in violation of their rights to political speech under the

(continued...)

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[3](...continued)
First and Fourteenth Amendments to the Constitution.

40. This disparate treatment also discriminates against Fulani and Moore on the basis of political program and beliefs in violation of the First and Fourteenth Amendments to the Constitution.

COUNT III

* * *

42. In the 1988 presidential election there are three candidates who are on the ballot in 51 jurisdictions and who qualified for federal primary matching funds. Two are white men; one is a Black woman. This Black woman's candidacy, moreover, poses a threat to the stability of the two-party system, and the connection between her race and the majority of her supporters and potential supporters is directly and integrally related to her ability to pose a threat.

43. Fulani met all of the requirements for being listed on the Indiana ballot, and is therefore listed on the Indiana ballot.

44. Bush and Dukakis did not meet all of the requirements for being listed on the Indiana ballot, but they are listed on the Indiana ballot nevertheless.

(continued...)

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[3](...continued)

45. Defendants have therefore discriminated against Fulani and Moore on the basis of their race and sex in violation of their rights to equal protection of the law under the Fourteenth Amendment to the Constitution.

COUNT IV

* * *

47. This claim is brought pursuant to the pendent jurisdiction of the Court.

* * *

50. Election code filing deadlines are to be strictly enforced, and defendants' failure to enforce the deadline provided in IC 3-10-4-5(c) is a violation of Indiana law.

51. An actual controversy exists between plaintiffs Fulani and Moore and the defendants, and plaintiffs have no adequate remedy at law to rectify their losses and alleviate the harm to them.

* * *

53. Fulani has demanded timely action by the defendants, but none has been taken.

54. The failure and refusal of the State Election Board and the Secretary of State to disqualify the Republican

(continued...)

Notwithstanding the great emphasis that the district court and the respondents placed on this tenuous argument, the court of appeals did not even address it explicitly, much less base its holding on it. Moreover, as discussed supra, the court of appeals'

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[3](...continued)
and Democratic candidates for presidential electors or remove Bush, Quayle, Dukakis and Bentsen's names from the Indiana ballot, constitute a failure by the defendants to perform their respective ministerial duties under law to enforce the Indiana election code, a violation of Indiana law and a violation of plaintiffs' rights to freedom of speech and association, and to equal protection of the laws under the First and Fourteenth Amendments to the Constitution.

COUNT V

* * *

57. Defendants' failure to disqualify the Republican and Democratic candidates from the ballot in a timely manner has caused plaintiffs Fulani, Moore, LBFCFE and the New Alliance Party to suffer damages in the sum of one million dollars ($1,000,000).

holding that the complaint presents a case or controversy, and that the petitioners had standing, is inconsistent with the respondents' assertions that this case is about speculation rather than about serious charges of partisan interference by government officials in an election competition.

2. Petitioners have stated claims upon which relief can be granted.

The specific, intentional, purposeful act of discrimination by the respondents of which the petitioners complain is placing the Republican and Democratic candidates on the ballot despite the failure of the major parties to file their candidates for presidential electors on time, in an historical and jurisprudential context of universal, strict enforcement of ballot access

filing deadlines in Indiana and everywhere else.

Petitioners Fulani and Moore should not have been required to compete for votes, support and resources with opposing candidates who were not legally on the Indiana ballot. The respondents' failure to remove the Republican and Democratic candidates for president and vice president from the ballot abridged petitioners' constitutional rights to equal participation in the election process free from arbitrary government action or inaction that favors the political strength of some persons and/or parties relative to others. See Moore v. Ogilvie, 394 U.S. 814 (1969).

The New Alliance, Republican and Democratic candidates for president and vice president were similarly situated in all respects material to equal pro-

tection analysis: They were candidates for the same offices, in the same election, in the State of Indiana, and were all subject to the August 1 deadline for certifying presidential elector candidates.

The respondents were obligated to apply the presidential-elector filing requirement to the three similarly-situated tickets in a uniform manner. Evenhanded application of the filing requirement would have entailed placing the New Alliance candidates on the ballot and disqualifying the Republican and Democratic candidates from the ballot. Instead, however, the respondents applied the statute differently to classes of people (major and non-major party candidates) who should have been treated alike.

Petitioners' constitutional claims are grounded in a blending of first amendment and equal protection principles. Under well-settled precedents, the petitioners do not have to establish that the respondents' actions were taken with invidious discriminatory intent. Rather, once an infringement of petitioners' first amendment interests is shown, the burden shifts to the respondents to show a compelling justification. See, e.g., Anderson v. Celebrezze, 460 U.S. 780, 786 n. 7 (1983); see also, Board of Education v. Pico, 457 U.S. 853, 870-871 (1982) (discretion may not be exercised in a partisan manner).

In short, petitioners have stated prima facie constitutional violations in their allegations of intentional conduct by state officials in which they discri-

minated against petitioners and in favor of their electoral adversaries on the basis of partisan political criteria.[4]

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[4] The unconstitutional partisan biases in the respondents' thought and conduct are so ingrained that they are expressed in the formulation of their arguments in the very briefing in which they are attempting to deny that they perpetrated purposeful discrimination. For example, respondents state at page 14 of their Opposition Brief:

> Indiana courts would not have necessarily treated the slight delay in advising the Secretary of State of the identity of already duly nominated Republican and Democratic presidential elector candidates (whose names did not even appear on the Indiana ballot) as grounds for precluding Indiana citizens from voting for either of the major party candidates for President and Vice-President in the 1988 Election.

Ironically, in this passage the respondents are confirming the very subject of "speculation" for which they have excoriated the plaintiffs. They are speculating that the Indiana courts would have approved a waiver of the filing deadline "for either of the major party candidates" (emphasis supplied). Respondents do not even attempt to speculate that the Indiana courts would have treated a "slight delay" by a minor party candidate in like manner. The

(continued...)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4](...continued)
operative factor is not preventing a slight delay from keeping any otherwise qualified candidate off the ballot, but rather preventing a slight delay from keeping a Republican or Democratic candidate off the ballot.

Hence, by speculating about what the Indiana courts may have ruled, the respondents are trying to legitimize respondents' own use of a partisan criterion (the major or minor party affiliation of the affected candidate) for determining how strictly to enforce the election laws.